STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

STATE OF CALIFORNIA (DEPARTMENT OF PERSONNEL ADMINISTRATION),		
Employer,	)	Case No. S-OB-108-S (S-D-131-S) (S-SR-7)
and,		
CALIFORNIA UNION OF SAFETY EMPLOYEES,	)	PERB Decision No. 948-S
Exclusive Representative,	)	August 6, 1992
and,		
CALIFORNIA STATE SAFETY EMPLOYEES COUNCIL/CALIFORNIA STATE PEACE OFFICERS ASSOCIATION,		
Petitioner.	)	
CALIFORNIA STATE SAFETY EMPLOYEES COUNCIL/CALIFORNIA STATE PEACE OFFICERS ASSOCIATION,		
Charging Party,	)	Case No. S-CO-123-S
v.		
CALIFORNIA UNION OF SAFETY EMPLOYEES,		
Respondent.	)	

Appearances: Carroll, Burdick & McDonough by Gary M. Messing, Attorney, for California Union of Safety Employees; Van Bourg, Weinberg, Roger & Rosenfeld by Stewart Weinberg, Attorney, for California State Safety Employees Council/California State Peace Officers Association.

Before Camilli, Caffrey and Carlyle, Members.

DECISION

CARLYLE, Member: This case is before the Public Employment Relations Board (PERB or Board) on appeal by California Union of Safety Employees (CAUSE) to a proposed decision (attached hereto)

of a PERB administrative law judge (ALJ). The ALJ found that an selection objection filed by the California State Safety Employees Council/California State Peace Officers Association (CSSEC) was valid as the voter list failed to contain the names of eligible seasonal lifeguards. The ALJ ordered the Sacramento Regional Director not to certify the results of the election conducted on May 2, 1991, and to conduct a new election. CAUSE requested oral argument which was heard by the Board on June 3, 1992.

The Board has reviewed the entire record, and finds the ALJ's findings of fact and conclusions of law to be free of prejudicial error and therefore adopts them as the decision of the Board itself.

DISCUSSION

On appeal to the Board, CAUSE raises numerous exceptions to the ALJ's findings. Most importantly, CAUSE excepts to the ALJ's finding that the seasonal lifeguards were improperly excluded from the list of eligible voters. In furtherance of its position, CAUSE argues that CSSEC had stipulated that seasonal lifeguards are not eligible voters. CAUSE also argues that even if CSSEC had not made the stipulation, CSSEC had waived any objection because of its failure to file a timely appeal.

First, the Board agrees with the ALJ's finding that a letter written by CSSEC to CAUSE, whereby CSSEC agreed that seasonal employees not on the state payroll at the time CSSEC filed its petition would not be counted for proof of support purposes, was not a stipulation as to the eligibility of those employees to

vote in the decertification election. The letter at issue came about after PERB had issued a notice of the filing of the decertification petition. CAUSE responded by arguing that signature cards and the proof of support that came from seasonal employees not on the payroll at that time should be discounted. CSSEC on December 2, 1990 responded by stating, in part:

> . . . although it is irrelevant whether or not these employees have voting rights within the unit, the petitioner would agree that seasonal employees not on the state payroll at the time petitioners filed should be not counted for proof of support purposes. However, our information and belief if that half of these 500 seasonals are still being listed by the state as current employees. (Emphasis added.)

Neither in form nor substance was this letter a stipulation as to the voter eligibility of these employees. The letter itself discussed nothing about voting rights and clearly stated that the issue of voting rights was irrelevant. Therefore the ALJ's finding is upheld.

CAUSE argues extensively that CSSEC should have challenged the exclusion of the seasonal lifeguards from the voter's list at the time of the regional director's directed election order, as it constituted an administrative decision. CAUSE argues that CSSEC failed to comply with PERB Regulation 32360[1] which requires

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[1]PERB Regulations are codified at California Code of Regulations, title 8, section 31001 et seq. PERB Regulation 32360 states:

> (a) An appeal may be filed with the Board itself from any administrative decision, except as noted in section 32380.

an appeal of an administrative decision to be filed within 10 days.

PERB Regulation 32350, Definition of an Administrative Determination states:

> (a) An administrative decision is any determination made by a Board agent other than:
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> (1) a refusal to issue a complaint in an unfair practice case pursuant to section 32630,
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> (2) a dismissal of an unfair practice charge,
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> (3) a determination of a public notice complaint, or
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> (4) a decision which results from the conduct of a formal hearing or from an investigation which results in the submission of a stipulated record and a proposed decision written pursuant to section 32215.
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> (b) An administrative decision shall contain a statement of the issues, fact, law and rationale used in reaching the determination.

CAUSE relies on subsection (a) claiming the Regional Director made an administrative decision when he issued the

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> (b) An original and 5 copies of the appeal shall be filed with the Board itself in the headquarters office within 10 days following the date of service of the decision or letter of determination.
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> (c) The appeal must be in writing and must state the specific issue(s) of procedure, fact, law or rationale that is appealed and state the grounds for the appeal.
>
> (d) Service and proof of service of the appeal pursuant to section 32140 are required.

directed election order. However, subsection (b) requires that an administrative decision must be in written form and contain issues, facts, law and rationale for reaching the determination. Nowhere does the directed election order contain the requirements of subsection (b) in regards to the exclusion of the seasonal lifeguards. Therefore, the directed election order in this case is not an administrative decision within the meaning of PERB Regulation 32350. Further, the regulation does not place a burden upon either party to request the Board agent to make an administrative decision.

CAUSE'S reading of the regulation is overly broad. In CAUSE'S view every decision of a Board agent would be an administrative decision except those specifically excluded by subsection (a). Such a result would require a party to immediately appeal a board agent's ruling on matters including evidentiary and procedural issues. This would cause unnecessary delays in the processing of cases or conducting of elections as each appeal would have to be reviewed separately by the Board. The Board finds that to undertake such a process would neither be[1] in the best interest of the parties nor promote judicial economy. CAUSE'S argument that CSSEC waived any objection to the exclusion of seasonal lifeguards from the eligible voter list by failing to file a timely appeal is rejected.

As to the eligibility of the seasonal lifeguards, CAUSE contends the test employed by the ALJ in determining eligibility is unworkable and that the Board should follow PERB regulation

32728[2] which provides, in part, that an eligible voter must be working on the voter eligibility cut-off date and on the date of the election.

Seasonal lifeguards are members of the civil service and thus are covered under the Dills Act definition of "state employee" under State of California (Department of Personnel Administration) (1990) PERB Decision No. 787-S. In the past, PERB has limited the right to vote among part-time and temporary workers to those employees "with an established interest in employment relations" with the employer. In Palo Alto Unified School District, et al. (1979) PERB Decision No. 84, the Board found an "established interest" existed among substitute school teachers who met certain guidelines. Further, workers must "have a reasonable expectation of continued employment." (Oakland Unified School District, et al. (1988) PERB Order No. Ad-172.) Although no test is perfect, the Board agrees with the ALJ's standards and findings.

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[2]PERB Regulation 32728 states in full:

> Voter Eligibility. Unless otherwise directed by the Board, to be eligible to vote in an election, employees must be employed in the voting unit as of the cutoff date for voter eligibility, and still employed on the date they cast their ballots in the election. Employees who are ill, on vacation, on leave of absence or sabbatical, temporarily laid off, and employees who are in the military service of the United States shall be eligible to vote. Mailed ballots may be utilized to maximize the opportunity of such voters to cast their ballots.

Relying on PERB precedent the ALJ then set out the following standard to determine those seasonal lifeguards who are eligible to vote:

(1) Have worked for the State in two or more consecutive seasons, the most recent of which was the season closest to the voter eligibility cut-off date;

(2) Have worked a minimum of 10 percent of the work year of a full-time lifeguard in the 12 months immediately preceding the voter eligibility cut-off date; and

(3) Have a reasonable expectation of continued employment in the next season after the voter eligibility cut-off date.

The ALJ determined that seasonal lifeguards will have a reasonable expectation of continued employment if they intend to return to work in the next season after the voter eligibility cut-off date and remain capable of performing lifeguard duties. However, an individual seasonal lifeguard's eligibility to vote could be subject to challenge if the party can demonstrate that the lifeguard does not have a reasonable expectation of continued employment.

In applying this test, the ALJ found that 292 additional seasonal lifeguards should be included on the voter list. When the 292 seasonal lifeguards are added to the voter eligibility count, it alters the number of votes needed by CAUSE to win the election. The Board is cognizant that under this test certain persons will be excluded from voting who were placed on the voter's list and are still employed at the time of the election.

However, the Board finds that to ensure the fairness of a decertification election, persons who have a reasonable expectation of employment in the future, and have worked continually in the past, should not be outnumbered by persons working a minimal amount of time and/or with no expectation of returning in the future. Since the omission of 292 seasonal lifeguards could have affected the election result, the Board affirms the ALJ's findings that the election result must be set aside.

CAUSE also takes exception to the ALJ's finding that certain Unit 7 classifications do not perform law enforcement-related functions, thus permitting the home addresses of those employees to be released to an employee organization. CAUSE asserts that [Government Code section 6254.3[3] prohibits the release of home

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[3]Government Code section 6254.3 states, in pertinent part:

> (a) The home addresses and home telephone numbers of state employees shall not be deemed to be public records and shall not be open to public inspection, except that disclosure of that information may be made as follows:
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> (3) To an employee organization pursuant to regulations adopted by the Public Employment Relations Board, except that the home addresses and home telephone numbers of state employees performing law enforcement-related functions shall not be disclosed.
>
> (b) Upon written request of any employee, a state agency shall not disclose the employee's home address or home telephone number pursuant to paragraph (3) of subdivision (a) and a state agency shall remove the employee's home address and home telephone number from any mailing list

addresses for employees performing law enforcement-related work. CAUSE argues that the ALJ narrowly interpreted "law enforcement-related functions," prohibiting the release of home addresses of only those classifications that enforce criminal statutes. CAUSE contends that all of the classifications in Unit 7 enforce laws and regulations and release of all employee home addresses should be prohibited.

CAUSE'S assertion that all of the classifications in Unit 7 enforce laws and regulations and thus fall under the definition of "law enforcement-related" is much too broad an interpretation. Further, CAUSE provides no authority in support of its contention. The ALJ, however, relying on a judicial interpretation of law enforcement in an employment context (Crumpler v. The Board of Administration, PERS, et al. (1973) 32 Cal.App.3d 567, 577 [108 Cal.Rptr 293]), determined that active law enforcement should be defined to include only those positions which have the responsibility to investigate crimes, pursue and arrest criminals, or which directly assist those officials. The Board concurs in this interpretation and thus rejects this exception.

Finally, CAUSE excepts to the ALJ's finding that a statement made by a CAUSE representative constituted a threat. After

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maintained by the agency, except if the list is used exclusively by the agency to contact the employee.

review of the record, the Board finds there is sufficient evidence to support this conclusion. Therefore, this exception is rejected.

ORDER

The ALJ's decision is affirmed. It is hereby ORDERED that the Sacramento Regional Director not certify the results of the election tallied on May 2, 1991 and that a new election be conducted.

Member Caffrey joined in this Decision.

Member Camilli's concurrence begins on page 11.

Camilli, Member, concurring: I concur that the administrative law judge's findings of fact and conclusions of law are free of prejudicial error and are therefore adopted as the decision of the Public Employment Relations Board (PERB or Board) itself. I also concur with the majority decision on the handling of all the various exceptions.

However, the Board's finding on the administrative decision exception should be resolved solely by the statement that the directed election order in this case is not an administrative decision within the meaning of PERB Regulation 32350. The discussion in the majority opinion is not necessary and potentially leads to the idea that a directed election order could be an administrative decision.

STATE OF CALIFORNIA
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of: STATE OF CALIFORNIA (DEPARTMENT OF PERSONNEL ADMINISTRATION), Employer, and, CALIFORNIA UNION OF SAFETY EMPLOYEES, Exclusive Representative, and, CALIFORNIA STATE SAFETY EMPLOYEES COUNCIL/CALIFORNIA STATE PEACE OFFICERS ASSOCIATION, Petitioner. CALIFORNIA STATE SAFETY EMPLOYEES COUNCIL/CALIFORNIA STATE PEACE OFFICERS ASSOCIATION, Charging Party, v. CALIFORNIA UNION OF SAFETY EMPLOYEES, Respondent.	Representation Case No. S-OB-108-S (S-D-131-S) (S-SR-7) **Unfair Practice** **Case No. S-CO-123-S** **PROPOSED DECISION** **(2/14/92)**

Appearances: Van Bourg, Weinberg, Roger & Rosenfeld by Stewart Weinberg for the Petitioner and Charging Party; Carroll, Burdick & McDonough by Gary M. Messing for the Exclusive Representative and Respondent; M. Jeffrey Fine, Attorney, for the Employer.

Before Ronald E. Blubaugh, Administrative Law Judge.

PROCEDURAL HISTORY

In these consolidated cases, a union that failed to win a majority vote in a state employee decertification election seeks

to have the election set aside and a new election ordered. This request is based on alleged interference with employee choice and alleged irregularities in the conduct of the election. The challenging union has advanced its election challenge through objections to the conduct of the election and an unfair practice charge against the incumbent exclusive representative.

The election under attack was conducted by mail ballot between April 1 and April 29, 1991, for the 5,700 employees in State of California bargaining Unit 7, Protective Services and Public Safety. The incumbent exclusive representative was and remains the California Union of Safety Employees (CAUSE). The union attempting the decertification was the California State Safety Employees Council/California State Peace Officers Association (CSSEC), an affiliate of the Laborers' International Union of North America (LIUNA or Laborers' Union).

Ballots were counted on May 2, 1991. The tally of ballots produced the following result:

Void Ballots	78
Votes for CAUSE	2122
Votes for CSSEC/CSPOA	1699
Votes for no representation	199
Valid votes counted	4020
Challenged ballots	50
Valid votes plus challenges	4070

Challenges were insufficient to affect the result of the election. A majority of the valid votes counted plus challenged ballots were cast for CAUSE.

The CSSEC challenges to election-related conduct began prior even to the commencement of voting. On March 6, 1991, CSSEC

filed an unfair practice charge against the State of California (State).[1] This charge attacked the State's refusal to provide CSSEC with home addresses of Unit 7 members. Next, on March 20, came an unfair practice charge against CAUSE.[2] This charge alleges that CAUSE distributed campaign literature which threatened and coerced employees. After the ballot count, on May 8, 1991, CSSEC filed objections to the conduct of the election.[3] The objections incorporated the allegations in the two unfair practice charges and added certain new grounds for setting aside the election.

The Office of the General Counsel of the Public Employment Relations Board (PERB or Board) issued complaints on both unfair practice charges. In case S-CE-483-S, the complaint alleged that the State interfered with organizational rights by refusing to provide CSSEC with the home addresses of employees who do not perform law enforcement related functions.[4] In case S-CO-123-S, the complaint alleges that CAUSE interfered with protected

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[1]The charge became unfair practice case no. S-CE-483-S.

[2]The charge became unfair practice case no. S-CO-123-S.

[3]The grounds and procedure for filing objections to an election are set out in the California Code of Regulations, title 8, section 32738.

[4]This action was alleged to be in violation of section 3519(b) of the Ralph C. Dills Act (Dills Act). (All references are to the Government Code unless otherwise indicated.) In relevant part, section 3519 provides as follows:

> It shall be unlawful for the state to . . . :
>
> (b) Deny to employee organizations rights guaranteed to them by this chapter.

employee rights by distributing literature which threatened employees through a general atmosphere of violence.[5]

Subsequently, the Sacramento Regional Director of the PERB scheduled a hearing on certain of the objections filed by CSSEC and dismissed the others. His dismissal was not appealed. The two unfair practice charges and the objections to election were consolidated for hearing. In sum, the objections to the election set out the following allegations:

> 1) The State refused to provide to CSSEC the home addresses of those Unit 7 members who do not perform law enforcement related functions.[6]
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> 2) Although CSSEC was given only employee work addresses, certain departments with employees in Unit 7 refused to deliver the organization's mail.
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> 3) The voter list provided by the State omitted the names of approximately 300 to 400 seasonal lifeguards who are civil service employees and eligible voters.

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[5]This action was alleged to be in violation of section 3519(b) of the Dills Act. (The correct section is 3519.5(b). An amendment correcting the complaint was made during the hearing. See Reporter's Transcript, Vol. 14, pp. 1-2.) In relevant part, section 3519.5 provides as follows:

> It shall be unlawful for an employee organization to:
>
> . . . . . .
>
> (b) Impose or threaten to impose reprisals on employees, to discriminate or threaten to discriminate against employees, or otherwise to interfere with, restrain, or coerce employees because of their exercise of rights guaranteed by this chapter.

[6]This is the election objection that parallels the allegation set out in unfair practice case S-CE-483-S.

4) The State denied access to CSSEC representatives attempting to visit Unit 7 employees at certain work locations.

5) On or about November 9 and 10, 1990, agents of CAUSE threatened individual Unit 7 employees with physical harm.

6) CAUSE, by the distribution of certain campaign literature, coerced employees through the establishment of a general atmosphere of fear and violence which inhibited employee free choice.[7]

A hearing in the consolidated unfair practice and objections to election cases was conducted over 16 nonconsecutive days commencing on June 12, and concluding on November 6, 1991. At the start of the fourth day of hearing, on July 19, CSSEC withdrew the unfair practice charge against the State and asked that the complaint be dismissed.[8] However, CSSEC did not withdraw the parallel objection to election and the underlying contention remains at issue.

With the filing of briefs, the matter was submitted for decision on February 4, 1992.[9]

FINDINGS OF FACT

Threats and Atmosphere of Violence

The objections to election set out two allegations involving threats and an atmosphere of violence: 1) that agents of CAUSE threatened individual Unit 7 employees with physical harm and

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[7]This is the election objection that parallels the allegation set out in unfair practice case S-CO-123-S.

[8]See Reporter's Transcript, Vol. 4, pp. 2-3.

[9]The State did not submit a brief.

2) that CAUSE, by the distribution of certain literature, coerced employee through a general atmosphere of fear and violence.

The alleged threats were made at a South Lake Tahoe meeting of the CAUSE Board of Directors on November 9-10, 1990. Some 20 CAUSE directors were present at the meeting which was conducted before an audience of approximately 30 to 40 CAUSE members. During a discussion about the pending decertification effort, CAUSE President Cecil Riley expressed a belief that CSSEC had somehow obtained a copy of the CAUSE mailing list. Mr. Riley stated further that he believed the list, which contains home addresses, had been secured in an unauthorized manner. He stated that some action would be taken soon, a statement interpreted by one witness to mean that a lawsuit would be filed against the suspected transgressors.

At that point, according to several witnesses, CAUSE Vice President Mike Nadeau became quite agitated about the disclosure of the home addresses. Stephen D. Johnson, who at the time was a vice president of CAUSE, testified of Nadeau:

> He went on to say that his agents were armed with automatic weapons and flak jackets and that they were looking for the person who distributed the list.

Ralph Martin, also a CAUSE vice president at the time, testified of Nadeau:

> He was very excited about it. He was very upset and stated that his—his members, the DOJ agents, narcotics enforcement people—as I recall, he said something to the effect that they carry automatic weapons, they are the first person[s] through the door, and if

> they ever found out who gave out their home addresses, those people would be sorry.

Jose Phillips, who was then a CAUSE contract negotiations chairman, testified of Nadeau:

> Basically I recall the fact that he described his agents as having such items and that they were pissed off. I recall the flight [sic] jackets and uzis or something like that.

No officer of CAUSE repudiated the statement at the time or later.

Several of those in attendance immediately took the comment as a threat against Vic Trevisanut, the former president of a CAUSE affiliate who had defected to become a leader in the decertification campaign. Mr. Trevisanut, a State park ranger, was not present at the meeting but was told about the remark by a number of people. Mr. Trevisanut quoted one person as telling him his life was in danger. Several witnesses also testified that they believed the threat was broad enough to include Mr. Trevisanut's wife, Sue, who was employed in the decertification campaign.

Stephen Johnson testified that he took the threat very seriously. He said Mr. Nadeau was angry and was not joking when he made the comment. He said he interpreted the statement to imply that agents were angry enough to kill people or at least to inflict some bodily harm on whoever distributed the membership list. Mr. Trevisanut said that although he did not take the threat seriously at first, his wife did and he eventually decided not to go anywhere without a gun for a period of about two

months. Ms. Trevisanut ultimately reported the incident to the Department of Justice, Mr. Nadeau and other Department of Justice agents do have access to automatic weapons and flak jackets.

The election objection regarding an atmosphere of violence is based upon CAUSE campaign literature which attempts to link the Laborers' Union with organized crime. CAUSE literature is replete with references to the alleged Mafia influence within the Laborers' Union. Articles describing the alleged link between the Laborers' Union and the Mafia appear throughout The CAUSE Report of January, February-March and April 1991. The publication/a monthly magazine, is distributed by CAUSE to all Unit 7 members for whom the union has addresses.

In the January 1991 edition, CAUSE President Cecil Riley wrote that "LIUNA is the same group that doesn't even try to hide its involvement with organized crime or La Cosa Nostra." He quoted an article from The Reader's Digest which asserts that the business agent of one LIUNA local is a Mafia member who had served "20 years for killing two police officers." He observed that peace officers face enough danger in their jobs without having "to worry about organized crime members having access to your home address." He then accused Vic Trevisanut "and a small group of individuals" of betraying CAUSE and its members "when he exposed our addresses to LIUNA." The same issue reprinted an article from The Sacramento Bee which described the purported link between the Laborers' Union and organized crime.

The February-March CAUSE Report has numerous articles and cartoons depicting a link between the Laborers' Union and organized crime. One page of the magazine sets out a list of LIUNA officers who have been convicted of various crimes and sentenced to prison. Another page purports to list the salaries of certain LIUNA officers and to disclose their relationship to the union president. One article is a four-page reprint from a portion of a report by The President's Commission on Organized Crime which alleges a series of links between the Laborers' Union and organized crime. Another article, reprinted from The Reader's Digest, is entitled "A Union in Bondage to the Mob; Beating or murdering anyone in their way, racketeers are plundering the hard-earned funds of America's laborers." The headline is descriptive of the contents of the article and the single union discussed in the article is the Laborers' Union. The April CAUSE Report contains more cartoons and articles alleging a link between the Laborers' Union and organized crime.,,.

Access

The objections to election allege two types of interference with access: 1) refusal to admit CSSEC representatives to certain work locations and 2) refusal to deliver organizational mail addressed to employees at certain work sites.

The official State policy regarding access to work sites and delivery of organizational mail was set out in a March 12, 1991, memorandum written by Rick McWilliam, Department of Personnel Administration chief of labor relations. The memorandum

generally directed the various departments affected by the Unit 7 election to permit organization access and to deliver organization mail.

Regarding access to facilities, the memorandum directed the departments to permit organization representatives to visit State employees during non-work time in non-work areas. Non-work time was defined to mean lunch, rest breaks and the time before and after work. Non-work areas were defined as cafeterias, break rooms, building foyers and other locations generally accessible to the public.

Regarding mail delivery, the memorandum directed the departments to deliver all mail which was properly posted and addressed to Unit 7 employees. The departments were directed not to release mail to union representatives for delivery to employees but to deliver the mail themselves in accord with normal procedures. The departments were advised that they need not accept mail with postage due. The cutoff date for delivery of mail was set at 12:00 noon on April 29, 1991, the last day of voting in the election.

CSSEC introduced evidence about restrictions placed on attempts by its representatives to visit the following State work sites: the Department of Justice at 4949 Broadway in Sacramento, Department of Motor Vehicles offices in Lodi and Placerville, California Highway Patrol offices in San Francisco and Oakland, the Department of Health office on Sutterville Road in

Sacramento, a Bureau of Automotive Repair office in Sacramento and Atascadero State Hospital

The Department of Justice building in Sacramento had the largest number of Unit 7 employees of any facility where CSSEC reported access problems. Of the approximately 2,500 persons employed in the building, some 400 belong to Unit 7. Joe Manzella, one of two CSSEC organizers who testified about access difficulties, said he attempted to enter the building on April 9, 1991, but he was denied access. He said a guard told him that he could not enter unless someone from "upstairs" escorted him into the facility. He asked the guard to call someone but the guard said there was no one for him to talk to. The guard suggested that Mr. Manzella distribute material to employees as they entered or left the building or while in the parking lot.

The Department of Justice building in Sacramento is a secure facility. Access is restricted to employees and escorted visitors. All persons in the building, including employees, must wear an identification badge. The entry to the building is enclosed in glass, behind which sits a guard who controls access.

Wayne Heine, labor relations officer for the Department of Justice, testified that with prior arrangements employee organizations are allowed access to the lunch room and an adjoining courtyard located in the center of the building. Mr. Heine testified that arrangements are to be made through him and that he told CSSECs principal organizer, Pat Hallahan, early in the election how to make the arrangements. Mr. Manzella

testified that he believed someone from CSSEC had made arrangements for him but he did know with whom. Mr. Hallahan testified that he exchanged several telephone calls with Mr. Heine during April of 1991 but never was able to reach him for a conversation about the access problem.

Mr. Manzella also encountered access problems at the Department of Motor Vehicles (DMV) office in Lodi. The office was one of six DMV offices Mr. Manzella visited on the same day in March of 1991 and the only one where he encountered difficulty. He was on a sweep of visitations and had made no prior arrangements at any of the offices. In Lodi, he spoke with a person he believed to be the supervisor of license registration examiners whom he asked to visit. He was told the facility was a State building and he was not allowed to go inside. He was told to try to meet with the employees as they entered and left the building.

Despite Mr. Manzella's difficulties, another CSSEC representative, Hector Bermea, visited the Lodi DMV office in the same month and did meet with three examiners. Mr. Bermea testified that he asked to go to the employee lunchroom. The supervisor refused him access to the room but brought three examiners to a public counter where he was able to speak with them.

On April 17, Mr. Manzella visited the DMV office in Placerville where he believed there were three or four examiners. He asked a supervisor for access to the break room so he could

meet with examiners. Despite assuring the supervisor he had been admitted in other DMV offices, he was told he could not have access because he was not a DMV employee. The supervisor told him he would have to wait in the parking lot to meet employees after work. He did encounter one examiner in the parking lot but that employee told him he already had voted in the election

Mr. Manzella also encountered access problems at a Department of Health office on Sutterville Road in Sacramento. He went to the office on April 5, 1991, to see departmental investigators. He had spoken by telephone with a supervisor in advance of his visit. She told him to come in the front door and then proceed to the lunch room.

When he arrived at the building, he could not determine which was the front door. One of the investigators encountered him at the Side door and took him into the building, At that point, a woman who identified herself as a supervisor overheard the discussion, remarked that she had told him to enter by the front door and directed him to the lunch room. He sat there for two hours but no one showed up. Later, he encountered an investigator who told him that investigators use a different break room. On another occasion, he returned to the office and encountered the same woman. He asked to see the investigators but she told him none were there.

On April 9, 1991, Mr. Manzella went to the Bureau of Automotive Repair office in Sacramento where he believed approximately seven Unit 7 employees worked. He was denied

access by a person named "Jerry" who claimed to be a supervisor. Mr. Manzella stood at the door, and tried to catch Unit 7 employees as they entered and left the building.

Hector Bermea, who organized on behalf of CSSEC in the Bay Area, visited two offices of the California Highway Patrol (CHP) where he encountered some difficulty. At 2 a.m. on a morning in November, he went to the CHP office in San Francisco to speak to some of the 14 to 16 communications clerks he believed to work in that office. A CHP officer refused to admit Mr. Bermea, telling him that no one in the office wanted to speak to him.

Mr. Bermea returned to the office in March or April and although the dispatch supervisor initially refused him admission, she ultimately allowed him access to the employee lounge. Mr. Bermea also visited the Oakland CHP office where he was admitted to the break room but told no one wanted to speak to him. He made no prior arrangements to visit any of the offices.

During the second week of April, 1991, Mr. Bermea made arrangements to visit Atascadero State Hospital to speak with hospital peace officers. He was told he could use the employee break room and speak with officers at the shift change. He successfully used the room for the 6 a.m. shift change where he met with seven to eight peace officers.

However, just prior to the 2 p.m. shift change, he was evicted from the room by the janitorial supervisor. The supervisor said the room was scheduled for waxing and floor polishing. The supervisor said he knew nothing about the room

being reserved for a union meeting and told Mr. Bermea to go to at the office. Mr. Bermea said by the time he was evicted from the room it was too late to make alternate arrangements.

The other access problems about which CSSEC complains involved refusals by several State agencies to deliver the organization's mail. In substantial part, the refusals to deliver mail were due to deficiencies in work addresses used by CSSEC, addresses which were supplied by the State.

The largest amount of mail returned to CSSEC from any address was from the Department of Justice at 4949 Broadway. The organization brought several bundles of such mail to the hearing and Sue Trevisanut, a CSSEC agent who supervised the mailing, testified that this was just a sample.

Department labor relations officer Heine testified that CSSEC used addresses which were not correct and often not cognizable to employees in the departmental mail room. The address problem was discovered with the arrival of the first large mailing of CSSEC materials. He said he was called by an employee in the mail room who asked for advice on how to handle a large bundle of CSSEC materials with unusable addresses. Mr. Heine directed the mail room employees to take the time to sort the mail, determine the correct routings and make every effort to deliver it.

Thereafter, on March 25, 1991, Mr. Heine called Patrick Hallahan, the organizer in charge of the campaign for the Laborer's Union. He told Mr. Hallahan about the problems with

the list and, on March 26, sent him a copy of a work address list for all Unit 7 members employed by the Department of Justice. The department earlier had provided the same list to the Department of Personnel Administration (DPA) but it was not forwarded to the employee organizations.

Mr. Hallahan testified that by the time he received the list it was too late to use. He said other materials already had been prepared for mailing with the old addresses and the organization did not have the time or resources that late in the election campaign to make the change. CSSEC, therefore, continued to use the work addresses originally supplied by DPA. Mr. Heine testified that after he provided the corrected list, the Department of Justice refused to deliver CSSEC mailings that were addressed incorrectly and returned them to the sender.

CSSEC introduced evidence about the return of smaller amounts of mail addressed to unit members employed at various work sites. These included the State Office Building at 107 South Broadway in Los Angeles, California Conservation Corps Centers in South Lake Tahoe and in San Luis Obispo, and Metropolitan and Atascadero State Hospitals. In the case of the mailing to South Lake Tahoe, the address provided to CSSEC by the State was simply faulty. In the other cases, there was no evidence that any State department had overtly refused to deliver the organization's mail. The evidence suggested, rather, that the employees were unknown at the address where the mail was sent.

Typical of the testimony about the mailings to other State work sites was that of Richard Holland, a hospital peace officer employed at Agnews Developmental Center in San Jose. Mr. Holland made 10 to 15 mailings of CSSEC campaign mail to hospital peace officers. He produced fewer than 10 pieces of mail that were returned, several of those marked "Returned to Sender Can't Identify" and "Return to Sender Not at this Address."

Home Address List

The objections to election allege that the State failed to provide CSSEC with the home addresses of those Unit 7 members who do not perform law enforcement-related functions. The statement of objections does not specifically identify the job classifications for which CSSEC believes home addresses were improperly withheld. However, on the fourth day of the hearing, the parties stipulated that the State acted properly when it withheld the home addresses of all employees in peace officer classes.[10] The total number of peace officer unit members covered by the stipulation is 3,015.

There was no stipulation regarding the remaining classes and CSSEC introduced testimony about 13 of them.[11] The testimony

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[10]The 56 peace officer classes which the parties stipulated as performing law enforcement-related duties are set out in Joint Exhibit no. 6. The stipulation may be found at pp. 1-3 of Vol. 4 of the reporter's transcript of the hearing.

[11]The classes about which no evidence was offered remain in dispute. In order to shorten the hearing, however, CSSEC determined to present evidence only about a limited number of those classes. It was agreed in an off-the-record discussion that this proposed decision would not specifically pass on whether the State should have released the home addresses of

revealed that these job classes can be loosely grouped into three broad categories. One group is composed of employees who, as a major portion of their duties, provide regular and direct assistance to law enforcement employees. Another group provides occasional assistance to law enforcement. The third group has only remote involvement with law enforcement employees.

The job classes that provide regular and direct assistance to law enforcement employees have a daily involvement with peace officers or the criminal justice system. These classes are composed of employees who occupy their work shifts communicating with peace officers or preparing information for them. Their focus is on law enforcement, not regulatory duties. In this group are communications operators for the California Highway Patrol and the California State Police[12] and Department of Justice criminal identification specialists.[13]

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those classes for which no testimony was offered.

[12] Communications operators for both the Highway Patrol and the State Police spend their entire work shifts in direct contact with peace officers. The sole focus of their duties is on providing support and assistance to peace officers. They relay reports of accidents and crimes to officers, dispatch officers to crime and accident scenes, dispatch backup officers, and search computer records when requested for criminal or vehicular information. Occasionally, communications operators are subject to threats from telephone callers who are dissatisfied with a peace officer contact.

[13] Criminal identification specialists work for the Department of Justice. They work in support of law enforcement by classifying and identifying fingerprints. It is their duty to compare fingerprints of known persons or of crime perpetrators to criminal records, looking for a match. Some specialists also keep records on stolen property. Not all criminal identification specialists have direct contact with peace officers, although all of them perform duties in support of peace officers. They all

The job classes that have only incidental contact with law enforcement are composed of employees who enforce regulatory and licensing laws. While the violation of certain of the regulatory laws may be criminal in nature, the focus of these employees is not with the criminal justice system. These classes are composed primarily of employees who work as examiners, inspectors and licensing representatives. Only incidentally do they become involved in law enforcement activities. In this group are motor carrier specialists,[14] deputy registrars of contractors,[15]

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have access to criminal records. Generally, they are not the subjects of threats.

[14]Motor carrier specialists inspect the facilities, vehicles and records of freight carriers to ensure they meet state safety standards. Specialists point out to carriers any defects they find in any part of the carrier's safety program, from problems with a particular vehicle to problems with supporting paperwork. If a specialist finds a carrier's safety program unsatisfactory, the carrier must bring it up to standard within a specified time. If the necessary corrections are not made, the specialist can recommend to supervisors that action be taken to remove the carrier's license. Occasionally, specialists have been threatened by employees of carriers.

[15] Deputy registrars of contractors investigate consumer complaints about contractors. Deputy registrars also investigate applications for contractor's licenses. Deputy registrars go to construction sites, interview property owners and contractors and attempt to mediate disputes. Depending upon the circumstances, they can recommend an administrative action against a contractor's license. Some actions by contractors can constitute criminal conduct. The Contractors' Licensing Board employs several peace officers whose duty it is handle such criminal actions. Occasionally, deputy registrars may write reports which lead to criminal action against a contractor. When this happens, someone else makes the decision to pursue the criminal complaint. Occasionally, deputy registrars also are threatened by contractors or their employees.

licensing inspectors for the Department of Motor Vehicles[16] and program representatives[17] for the Bureau of Automotive Repair.

The third group has only rare involvement with law enforcement. Employees in some of these classes are involved in licensing and inspection. Employees in other classes work primarily with the public. What the evidence shows about these employees is that their involvement with law enforcement is highly infrequent. They do not enforce the criminal laws and their contact with criminal activity, if it occurs at all, is incidental to their regular duties. In this category are the brand inspector,[18] conservationist,[19] dairy foods specialist,[20]

[16] The licensing inspector assures compliance with licensing requirements for vehicle dealers, manufacturers, distributors, dismantlers, remanufacturers, vehicle verifiers, driving schools, traffic violator schools and agencies authorized to provide registration services outside the Department of Motor Vehicles. Inspectors visit business locations to determine whether persons seeking to operate licensed activities satisfy regulatory requirements. Inspectors can recommend license cancellations for businesses that do not comply with requirements. Inspectors occasionally assist department peace officers investigating criminal activity. Inspectors are occasionally subject to threats.

[17] Program representatives for the Bureau of Automotive Repair perform inspections of repair shops that issue smog, lamp and brake certifications. They also inspect shops to ensure they are appropriately licensed by the State. Where a pattern of violations is found, the representatives can recommend that administrative action be taken against the licenses of shop operators. They also occupy a good portion of their time in mediating disputes between consumers and repair shops. Program representatives have no authority to initiate criminal action, although reports they make may be the basis for criminal action in some situations. Occasionally, program representatives have been threatened by shop owners.

[18] The brand inspector is employed by the State Department of Agriculture to inspect livestock brands at points of sale or transfer of ownership. Although the ultimate purpose of the job

licensing and registration examiner[121] for the Department of Motor Vehicle's, fire fighter and seasonal lifeguard.[22]

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is to prevent cattle theft, the brand inspector has scant involvement in the apprehension of cattle thieves. The brand inspector who testified at the hearing has not been involved in a cattle theft investigation in three years. When he is involved in theft investigations, it is only as a person knowledgeable about livestock who can provide information to the local sheriff.

[19]The conservationist works for the California Conservation Corps (CCC). Conservationists monitor the work of CCC members, do monthly evaluations of corps members and help train them. Conservationists II develop safety programs for corps members and have contact with public agency heads, attempting to arrange reimbursable contracts for the CCC. Neither Conservationists I or II have any discernable contact with law enforcement agencies.

[20]The dairy foods specialist works for the Department of Food and Agriculture. The primary function of the dairy foods specialist is to conduct sanitation inspections at milk plants and dairy farms. The specialist samples milk and dairy products which are then tested for bacteria and chemical contents. The specialist also tests pasteurizing equipment for accuracy and function. The dairy specialist can impound or condemn tainted dairy products. He can issue a citation to a dairy that fails to meet sanitation requirements. The specialist would report any suspected criminal activity that he observes but has no authority to take action against it.

[21]Licensing and registration examiners conduct driver's license examinations. This includes written and behind-the-wheel drive tests. They have no authority to issue citations either for traffic violations made by test takers or for vehicular violations such as expired registrations. At times, they will suspend driver's licenses if instructions to make the suspension are contained in department records. The only contact examiners have with law enforcement is the occasional situation when they must seek the assistance of police to control persons who become disruptive in DMV offices. Examiners are occasionally threatened by persons who fail driver's licensing examinations.

[22]Fire fighters engage primarily in the suppression of fires in state facilities. The fire fighter about whom testimony was taken works for the Department of Developmental Services at Camarillo Developmental Center. Fire fighters also inspect fire extinguishers, buildings, alarms, safety equipment and fire suppression systems. They operate ambulances and coordinate disaster relief. The fire fighter reports to law enforcement any illegal activity he/she might encounter. However, evidence at

Although the evidence shows that the State refused to provide CSSEC with the home addresses of certain Unit 7 members, there is no showing this omission prevented CSSEC from distributing its literature. Numerous witnesses were asked during the hearing whether they received campaign literature from CSSEC during the election period. Virtually all said they had received literature either at home or at work or both. The CSSEC mailing list, which was introduced into the record,[24] contains numerous home addresses. Although there are some names which have no mailing address, these are few.

Voter List

Finally, the objections to election set out an allegation that the voter list omitted the names of some 300 to 400 seasonal lifeguards, all of them eligible voters.

The State Department of Parks and Recreation hires two categories of temporary lifeguards to work at its beaches and recreation facilities. These are Lifeguard I (Seasonal) and Lifeguard II (Seasonal); both employed to work at ocean

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the hearing suggests that the fire fighter's involvement with law enforcement officers is infrequent.

[23]Seasonal lifeguards monitor beach and water safety and make rescues, either through the surf or by boat. They enforce beach rules, such as prohibitions against drinking or having dogs loose on the beach. They enforce these rules by requesting compliance. If the violators are recalcitrant, they request assistance from the permanent lifeguards who are peace officers. All arrests are made by the permanent lifeguards. Occasionally, a seasonal lifeguard is threatened by persons on the beach.

[24]CAUSE Exhibit no. 5.

beaches,[25] and Pool Lifeguard (Seasonal), employed to work at State-operated swimming pools. The vast majority of the temporary lifeguards are those employed to work at the ocean beaches and testimony at the hearing primarily concerned them.

Although there are seasonal lifeguards employed at all times of the year, most work during the warm weather months, primarily from Memorial Day through Labor Day. Seasonal lifeguards also work during Christmas and spring vacations, if the weather is warm enough to draw substantial numbers of visitors to the beaches. At all times, their primary duty is to monitor beach and ocean safety, make rescues both through the surf and by boat. They administer first aid, using oxygen as appropriate. They also ensure that park visitors obey park rules.[26]

Seasonal lifeguards must hold various lifesaving certifications from the Red Cross. In order to be hired the first time, a candidate for a seasonal lifeguard position must successfully complete a 1,000 yard swim in the ocean within 20 minutes. After a 15 minute break, the candidate must then run 200 yards, swim 400 yards in the ocean and then run 200 more yards, all within 10 minutes. Candidates who succeed, then must pass a screening interview and, if selected, a lifeguard training program.

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[25]Seasonal Lifeguards I and II perform similar duties except that the Lifeguard II is a lead worker. The Lifeguard II also participates in and directs major rescues and decides when to move or close lifeguard towers.

[26]One witness joked that it is the duty of the lifeguard "to protect the people in the park, and the park from the people."

Seasonal lifeguards are hired for limited term appointments, known in State personnel jargon as Temporary Authorization (TAU). Their appointments are limited to 1,500 hours a year, although on an emergency basis the Department can increase this by 200 additional hours. No seasonal lifeguard is guaranteed full-time work. The number of hours seasonal lifeguards work is affected by State budget considerations, the weather and water temperature and the size of the crowds on the beach. The summer of 1991, for example, was unusually cool in Southern California. This limited the numbers of persons who visited State beaches which in turn limited the number of hours worked by seasonal lifeguards.

Each district of the Department of Parks and Recreation maintains some type of list containing the name, address and phone number of each seasonal lifeguard. In late winter, seasonal lifeguards are surveyed about their interest in returning for the subsequent summer. They must complete a health questionnaire and state their preferences about the amount of hours they wish to work and any scheduling preferences.

The contract between the State and CAUSE requires the State "to consider service credits as one means of recalling seasonal lifeguards."[27] The effect of this provision is that the more senior lifeguards are the first to be offered reemployment. Other factors include "annual performance test evaluations, on-the-job performance, employee availability, and desire to be

[27]The memorandum of understanding is CSSEC Exhibit no. 1. The applicable contract provision is section 18.7.

recalled." The annual performance test is a 1,000-yard requalification swim in the ocean given on a pass-fail basis. In early spring, seasonal lifeguards who express interest in returning to work are scheduled for the swim. Candidates for rehire rarely fail to pass. When they do fail, they usually succeed on a second attempt.

It is common for seasonal lifeguards to return season after season. Pat Higginson, a 10-year veteran seasonal lifeguard, testified that in the Pendleton Coast District (San Clemente) where he works there is one seasonal lifeguard with 20 years of service. There are others with 16, 15, 11 and 10 years of service. He estimated that the average seasonal lifeguard works 5 to 6 years in the Pendleton Coast District. Kirk Sturm, a lifeguard supervisor in the Channel Coast District (Ventura), testified that in his District there are lifeguards with 17, 13, 8, 7 and 6 years of service. He estimated the average length of service at 4 to 5 years.

Following each season, the Department of Parks and Recreation notifies the Office of the State Controller to separate the seasonal lifeguards from the State payroll. This occurs in late September or early October. Typically, although not always, only those seasonal lifeguards who continue to work into the fall and winter are retained in the records as current employees. This practice by the Department of Parks and Recreation contrasts with the practice of the California State Fair. The State Fair employs peace officers who work only during

the 18 day run of the fair but their names are retained as current employees throughout the remainder of the year.

The result of this different treatment by the two departments had an effect on the voter list. The voter eligibility list contained only the names of those seasonal lifeguards actually working on the voter eligibility cutoff date. However, the names of State Fair police not working on the cutoff date were contained on the voter list. Howard Ballin, a State Fair police officer called as a witness by CSSEC, identified 27 State Fair police officers whose names were on the voter list even though the officers work only during the 18 days of the fair.

The question of whether the names of seasonal lifeguards would be on the voter list was discussed at the pre-election conference. A representative of the State Controller advised the participants that, depending upon the voter eligibility date that was chosen, some intermittent and seasonal employees would be left off the list. Patrick Hallahan, who represented CSSEC, stated that he wanted the seasonal employees to be included on the voter list. CAUSE representative Sam McCall opposed this.[28] No specific direction to include the seasonal employees was given to the State Controller and only the names of those on the payroll on the eligibility cutoff date were included on the list.

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[28] I credit the testimony of Arle Simon and Patrick Hallahan on this point. Insofar as Mr. McCall testified differently, I conclude that his recollection was incorrect.

Instructions were posted in State Parks and Recreation offices regarding how employees could vote in the election even if they were not sent a ballot. Since this was during the off season, few seasonal lifeguards were in a position to see the posted notices. Nevertheless, there were 33 seasonal lifeguards who did find out about and use the challenged ballot procedure to request ballots. Of these, 21 returned ballots. None were counted.

LEGAL ISSUES

1) Did CAUSE threaten and coerce employees in violation of Dills Act section 3519.5(b) through the distribution of campaign literature that established a general atmosphere of violence and threats of violence?

2) Should the election result be set aside because the free choice of employees was interfered with and/or the election was conducted with serious irregularity through:

A) Threats and the creation of an atmosphere of violence by CAUSE?

B) Restrictions by the State on CSSEC access to unit members through limitations on CSSEC organizers and refusal to deliver CSSEC mail at the work site?

C) Denial to CSSEC by the State of the home addresses of unit members who do not perform law enforcement-related duties?

D) Omission from the voter list of a sufficient number of eligible voters to affect the election result?

CONCLUSIONS OF LAW

Introduction

PERB regulations set out two grounds for objections to the conduct of an election:[29]

> 1) The conduct complained of interfered with the employees' right to freely choose a representative, or
>
> 2) Serious irregularity in the conduct of the election.

Since its very first decision, the Board has consistently held that for election objections to be sustained, some effect on the election result must either be shown or logically inferred. In that first decision,[30] the Board wrote:

> In the absence of evidence that voters were discouraged from voting, we would sustain the Association's . . . objections only on [a] finding that those events had the natural and probable effect of discouraging voter participation in the representation election.

In that case, the Board eschewed the per se rules often followed in National Labor Relations Board (NLRB) decisions and dismissed, the objections to election.

In subsequent cases, the Board has held that even the demonstration of unlawful conduct in the election environment is but "a threshold question." (State of California (Department of Personnel Administration et al.) (1986) PERB Decision

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[29] See California Code of Regulations, title 8, section 32738.

[30] Tamalpais Union High School District (1976) EERB Decision No. 1. Prior to 1978, the Public Employment Relations Board was known as the Educational Employment Relations Board.

No. 601-S.)[31] The Board will not in every situation where conduct tantamount to an unfair practice has been demonstrated, order that the election be rerun. The basic question is whether taken collectively the various unlawful activities establish a "probable impact on the employees' vote." (Jefferson Elementary School District (1981) PERB Decision No. 164.)[32]

In deciding whether to set aside the election result, the Board will look "upon the totality of circumstances raised in each case and, when appropriate, the cumulative effect of the conduct which forms the basis for the relief requested." (Clovis Unified School District (1984) PERB Decision No. 389.) Thus, even where some impact on voters can be inferred, the election result in some circumstances still may not be set aside.

It is against these standards that Petitioner's contentions must be tested.

Threats and Atmosphere of Violence

State employees have the protected right to "form, join, and participate in the activities of employee organizations of their own choosing for the purpose of representation on all matters of employer-employee relations."[33] It is unlawful for an employee

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[31]See also, San Ramon Valley Unified School District (1979) PERB Decision No. Ill and Clovis Unified School District (1984) PERB Decision No. 389.

[32]It is unnecessary that actual impact be proven. (San Ramon Valley Unified School District, supra; Clovis Unified School District, supra.)

"Section 3515.

organization to "impose or threaten to impose reprisals on employees" because of their exercise; of these protected rights.[34] Threats which interfere with employee rights to participate in an election can be both an unfair practice and grounds for sustaining objections to the outcome of that election.

In the private sector, the NLRB will set aside an election where there is an atmosphere of violence or threats of violence. Such an atmosphere, the NLRB holds, is inimical to employee free choice because it destroys the laboratory conditions needed for a fair election.[35] The test for determining whether the election should be set aside is "whether the election was held with a general atmosphere among the employees of confusion, violence, and threats of violence, such as might reasonably be expected to generate anxiety and fear of reprisal, and to render impossible a rational uncoerced expression of choice as to bargaining representative."[36]

The test is objective and not determinative upon the effects of the particular statement upon a particular employee or employees. The PERB, in following federal precedent, looks to see whether the particular threat "may reasonably tend to coerce or intimidate employees in the exercise of their rights." (Fresno Unified School District (1982) PERB Decision No. 208 and

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[34]Section 3519.5(b).

[35]See Morris, The Developing Labor Law, BNA, 1983, Vol. 1, pp. 330-331, and cases cited therein.

[36]Id., quoting Poinsett Lumber & Mfg. Co. (1956) 116 NLRB 1732 [39 LRRM 1083].

cases cited therein; see also, Clovis Unified School District (1984)PERB Decision No: 389.)

"Threats of physical violence and bodily injury are generally always found to be coercive." (Fresno Unified School District, supra. and cases cited therein.) Under federal cases involving election objections, it is "immaterial that fear and disorder may have been created by individual employees or non-employees and that their conduct cannot be attributed to either the employer or to the union. The significant fact is that such conditions existed and that a free election was thereby rendered impossible."[37]

CSSEC makes two central allegations. As one of the grounds for objection, CSSEC contends that CAUSE agent Mike Nadeau threatened CSSEC advocate Victor Trevisanut. Secondly, as both a ground for objection and unfair practice, CSSEC contends that CAUSE through the distribution of campaign literature created such an atmosphere of fear of violence that a fair election was impossible.

CAUSE contends that nothing in the record supports the contention that Mike Nadeau's comment was a threat. CAUSE argues that the only possible way one could find a threat is if one believed that Mr. Nadeau had the power to order the "agents" to take action against Mr. Trevisanut. Citing the testimony of various witnesses, CAUSE contends that the statement was more of

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[37]Id., quoting Al Long, Inc. (1968) 173 NLRB 447 [69 LRRM 1366].

an expression of displeasure, voiced "in rather dramatic and vulgar terms," or an "attention getter."

CAUSE makes too little of the Mike Nadeau statement. The comment that special agents armed with automatic weapons were looking for whoever turned over to CSSEC the CAUSE home address list was plainly a threat. A reasonable person hearing that comment could draw no other inference but that bodily harm would be done to that person, if found. The evidence also makes it clear that persons who heard the comment understood it to mean Victor Trevisanut. Any ambiguity about the target of the comment was clarified in the January CAUSE Report where Mr. Trevisanut was accused by name as being the person who turned over to CSSEC the CAUSE home address list.

At the time Mr. Nadeau made the statement he was a CAUSE officer. The statement was made during a meeting of CAUSE officers, not one of whom at the time or later repudiated the comment. Given this context, the statement can be imputed to CAUSE as an organization.

Mr. Nadeau's threat would have the natural and probable effect of discouraging the person against whom the threat was made from further participation in protected activity. It is irrelevant that Mr. Trevisanut was not discouraged because the standard against which the threat is measured is objective. It is irrelevant also that CAUSE may have had what it considered good grounds for believing that Mr. Trevisanut had taken the mailing list. Theft of such a list would not entitle CAUSE as an

organization to threaten grave bodily harm to the person suspected of taking it.

If the complaint had alleged that Mike Nadeau's threat was an unfair practice, such a finding would have been warranted. CSSEC, however, advanced this allegation only as one of the grounds for objection. As a ground for objection, the proof, of a threat meets only the threshold showing. The question, in the context of an objection, is whether the threat was sufficient to have interfered with free choice. An approach for analyzing the effect of a threat upon an election is set out in Zeiglers Refuse Collectors v. NLRB (3d Cir. 1981) 639 F.2d 1000 [106 LRRM 2331], a case cited by the Petitioner. There, the Court wrote:

> In determining whether a fair and free choice by the employees was impossible the Board must consider many factors. These include: the number of the threats, the severity of the threats and whether those threatened were put in fear, the number of workers threatened, whether the threats were made close to the election and whether they persisted in the minds of the employees at the time of the election, whether the reports of the threats were widely circulated, whether the effect of pro-union threats were cancelled out by pro-management threats, the closeness of the vote . . . . [106 LRRM 2334-2335]

There was one very grave threat of bodily harm directed principally at Mr. Trevisanut, although it possibly also included a small group of his associates. Mr. Trevisanut for awhile was fearful, as would have been any reasonable person in like circumstances. But, as CAUSE points out, the threat was remote in time to the election, occurring almost five months prior to

the mailing of ballots. There is no evidence that reports of the threat were widely circulated or that a substantial number of voters even knew about it. There is no evidence that knowledge about the threat persisted in the minds of those who knew about it by the time of the election.

It should be noted, moreover, that unlike the typical case involving election threats, Mr. Nadeau's threat was not directed at influencing voter choice. There is no evidence, for example, that he or anyone warned that there would be "smashed faces" or that CAUSE organizers "would kick ass and take names if we don't win the election."[38] There was no threat that harm would come to any particular employee or employees if they voted for CSSEC and there is no evidence anyone was discouraged from voting by the Mike Nadeau threat. There is, therefore, no evidence that the threat had an actual impact on the election.

Since there is no evidence that any significant number of unit members knew about the threat made at the Lake Tahoe meeting, it is similarly impossible to infer an impact. If this were a small school district, one might assume that Mr. Nadeau's comments were known by most unit members. But this is a bargaining unit of 5,700 members employed in many State departments spread throughout California. In the absence of evidence that the threat was widely known among members of the bargaining unit, an impact on the election cannot be inferred.

[38]See NLRB v. Urban Telephone Corporation (7th Cir 1974) 499 F.2d 239 [86 LRRM 2704 at 2706], a case cited by the Petitioner.

CSSEC would couple the threat against Mr. Trevisanut with what it describes as CAUSE'S -"unrelenting campaign linking CSSEC to the 'mob' and to incidents of violence perpetrated by Laborers Union officers elsewhere in the country." Played against an insinuation that home addresses would be given to the Mafia, CSSEC argues, CAUSE created an atmosphere of fear and violence which destroyed a free and fair election choice.

CAUSE rejects all attempts to link the Nadeau comment to its campaign material. CAUSE argues that the content of the Nadeau statement was entirely dissimilar and unrelated to the content of the campaign literature. CAUSE contends that the election cannot be set aside on the basis of the truthfulness of its campaign material. CAUSE argues that its literature was nothing more than campaign propaganda and there is no evidence that any voters saw it as anything else. Certainly, CAUSE asserts, there is no evidence that anything distributed by CAUSE had any negative effect on voter participation.

If accepted, CSSECs attack on the CAUSE campaign literature would preclude CAUSE from raising as an election issue the alleged connection between the Laborers' Union and organized crime. CSSEC's argument also would preclude any campaign discussion of the Laborers' alleged participation in violent activities elsewhere in the country. CSSEC reasons that by accusing the Laborers' Union of a track record of violence CAUSE is itself creating an atmosphere of violence.

PERB cases do not assume a lack of sophistication or timidity on the part of the voters. There is no showing that employees were afraid to vote because of this alleged link to organized crime. Nor can it be inferred that just because such an accusation was made that employees would automatically believe it and drop out of the election process. Accordingly, I cannot conclude that the threat against Mr. Trevisanut and the CAUSE campaign literature were sufficient to affect the outcome of the election.

Access

The Dills Act is silent about rights of access for employee organizations.[39] Nevertheless, since one of its earliest decisions enforcing the statute, the Board has held "that a right of access is implicit in the purpose and intent" of the law. (State of California (Department of Corrections) (1980) PERB Decision No. 127-S.) This right, according to the Board, is inherent in the required nature of public access to the functioning of government. Since a public employer cannot exclude members of the public from its place of operation, neither can it exclude employee organizations.

A public employer can, however, "reasonably regulate access where necessary to assure the safety of its employees, wards and facilities and the efficient operation of its official business."

[39] In this regard, the statute differs from the other two laws administered by the PERB. See section 3543.1(b) of the Educational Employment Relations Act and section 3568 of the Higher Education Employer-Employee Relations Act.

(Ibid.) The right to reasonable regulation extends to mail as well as to physical access. (See, State of California (Department of Transportation et al.) (1981) PERB Decision No. 159b-S.) It is against this rule of reasonableness that infringements on access must be measured.

CSSEC presented evidence about two types of interference with access, refusal to admit CSSEC representatives to certain work locations and refusal to deliver CSSEC mail at some sites. CSSEC acknowledges that the number of undelivered pieces of mail "is not large." But it contends that because the votes separating it from CAUSE is small, even a small number of returned pieces of mail and denials of access to work sites is sufficient to invalidate the election. "Since it cannot be said that the outcome would not have been different had CSSECs efforts to communicate not been frustrated," CSSEC argues, "a new election should be held."

CAUSE replies that a "cannot-be-said-the-outcome-would-not-have been different" test is not the standard applied by PERB. Citing various PERB cases, CAUSE argues that the Petitioner must show that alleged denials of access and interference with mail had a probable impact on the employees' vote. CAUSE argues that among the hundreds of Unit 7 work sites, the evidence demonstrates only marginal access problems. Indeed, CAUSE contends, the evidence shows that CSSEC had access to the overwhelming majority of Unit 7 employees and only "minuscule" problems with returned mail.

I agree with CAUSE. If there had been widespread denials of access or interference with, mail delivery, one might infer that these actions had a "probable impact on the employees' vote." (Jefferson Elementary School District, supra, PERB Decision No. 164.) But it is highly speculative that any of CSSEC's access or mail delivery problems had an impact on the election.

The interference with access occurred at a few isolated State offices due mostly to the failure of the CSSEC organizer to make advance arrangements. At the tightly secured Department of Justice building the CSSEC organizer simply showed up and expected to be admitted. No member of the public could gain entry to the building in that manner. At a CHP, a CSSEC organizer attempted to gain entry in the middle of the night. It is unreasonable to believe the State would allow anyone into the office at that time of the night. Moreover, when the same organizer returned during daylight hours, he was admitted. While a CSSEC organizer who had made prior arrangements was removed a meeting room by a janitorial crew at Atascadero State Hospital, the number of affected employees were few.

The problems with mail delivery were more significant. In most instances, these were due to faulty work addresses given to CSSEC by the State. Particularly egregious were the faulty work addresses given to CSSEC for the Department of Justice. Department of Justice labor relations officer Wayne Heine testified that he had given the DPA a better address list.

However, this list was not given to CSSEC by DPA and by the time Mr. Heine got it to CSSEC, the election was well underway.

While some effect from the faulty work addresses was demonstrated, there is no basis for concluding that because of the bad addresses CSSEC was unable to get its message to voters. Numerous witnesses were asked during the hearing whether they received campaign literature from CSSEC during the election period. Virtually all said they had received literature either at home or at work or both. Indeed, for many if not most unit members CSSEC had home addresses acquired through other means.

There is insufficient evidence, therefore, to conclude that the faulty addresses supplied to CSSEC by DPA were sufficient to have a "probable impact" upon the outcome of the election.

Home Address List

PERB regulations require the State employer to file with the regional office a pre-election list of voters containing among other things the "home address of each eligible voter."[40] The regulations require the employer to concurrently serve copies of the list on each other party to the election. The regulation continues:

> . . . For purposes of this subsection, mailing address means the home address of each eligible voter, except in the case where the release of the home address of the employee is prohibited by law, or if the Board shall determine that the release of

[40]See California Code of Regulations, title 8, section 32726.

home addresses is likely to be harmful to the employees.[41]

This language appeared in interim PERB regulations issued in 1980 just prior to the commencement of the first elections under the State Employer-Employee Relations Act (as the Dills Act was then known). There is no PERB decision which describes the circumstances under which the release of home addresses "is likely to be harmful" to employees. Nor is that provision applicable here. No party, prior to the election, raised to the Regional Director a contention that disclosure of home addresses of Unit 7 employees was prohibited under PERB regulations as "likely to be harmful to the employees."[42] The Board made no such determination prior to the election and no party can assert that justification now.

It is uncontested that the State refused to disclose the home addresses of any member of Unit 7 to either of the contesting employee organizations. In refusing to turn over the addresses, the State acted on the request of CAUSE and relied solely upon Government Code section 6254.3.[43]

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[41]California Code of Regulations, title 8, section 32726, subsection (b).

[42]On February 5, 1991, CAUSE filed a statement of opposition to release of home addresses. Although this document advances many reasons why home addresses should not be released, it does not rely on the PERB regulatory provision against address release if "likely to be harmful to the employees." Rather, the filing relies upon the prohibition against release of addresses where "prohibited by law," citing Government Code section 6254.3.

[43]Government Code section 6254.3 provides:

This section, while setting out a general rule of confidentiality for the home addresses of State employees, permits address disclosure for employees in PERB-conducted

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> (a) The home addresses and home telephone numbers of state employees shall not be deemed to be public records and shall not be open to public inspection, except that disclosure of that information may be made as follows:
>
> > (1) To an agent, or a family member of the individual to whom the information pertains.
> >
> > (2) To an officer or employee of another state agency when necessary for the performance of its official duties.
> >
> > (3) To an employee organization pursuant to regulations adopted by the Public Employment Relations Board, except that the home addresses and home telephone numbers of state employees performing law enforcement-related functions shall not be disclosed.
> >
> > (4) To an agent or employee of a health benefit plan providing health services or administering claims for health services to state employees and their enrolled dependents, for the purpose of providing the health services or administering claims for employees and their enrolled dependents.
>
> (b) Upon written request of any employee, a state agency shall not disclose the employee's home address or home telephone number pursuant to paragraph (3) of subdivision (a) and a state agency shall remove the employee's home address and home telephone number from any mailing list maintained by the agency, except if the list is used exclusively by the agency to contact the employee.

elections. But even in elections, the statute maintains the confidentiality of home addresses for employees "performing law enforcement-related functions." The section also precludes disclosure of home addresses for employees who request in writing that their addresses not be disclosed.

This section, which became law as chapter 1657 of the Statutes of 1984, has never been judicially interpreted. Extensive legislative histories, placed into the record by CSSEC[44] and the State,[45] show that the phrase "law enforcement-related functions" was contained in the measure virtually from the beginning.[46] But these histories provide virtually no guidance about the meaning of the phrase. There is no definition of "law enforcement-related functions" in the statute and there is nothing in the legislative history in which the author or any supporter of the measure advances a definition.

Several of the bill analyses cite a Sacramento Court order, which required the State Controller to release home addresses to a non-recognized organization, as the reason for the bill.[47] The

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[44]Judicial Notice Exhibit no. 1.

[45]Judicial Notice Exhibit no. 2.

[46]Assembly Bill 3100 began as a measure concerning pre-retirement counseling for State employees. With an amendment of April 12, 1984, the subject of the bill was changed to public records. That first amendment inserted a prohibition against the disclosure of the home addresses of State employees performing law enforcement-related functions.

[47]A bill analysis from the Senate Republican Caucus, dated August 17, 1984, offers the following explanation:

California Highway Patrol, in urging former Governor Deukmejian sign the measure, wrote that, restriction on release of home addresses would "decrease the chances of a member of the criminal element gaining access to a peace officer's home address and phone number." A similar message urging the Governor to sign the bill was sent by the Franchise Tax Board.

CSSEC argues that the phrase "law enforcement-related functions" includes only those Unit 7 occupations that perform peace officer duties or duties intimately related to those of a peace officer. "These would be functions," CSSEC argues, "where the individual employee is called upon to exercise discretion and independent judgment relative to the application of a statute which has a criminal sanction and without whose participation the

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Since the enactment of collective bargaining legislation affecting State agencies, several lawsuits have been brought by employee organizations against State agencies, seeking disclosure of employee home addresses to enable the organizations to contact employees directly. The decisions rendered in these lawsuits have not provided any uniformity of interpretation.

Most recently, the Sacramento Superior Court ordered the State Controller to release home addresses of specified groups of employees to an organization of State workers State Employees for Democratic Choice (SEDC) v. Cory, et al. While the Controller has been providing the exclusive bargaining agents with the names and home addresses of State Employees in their respective units, SEDC is not a recognized bargaining unit. The Court's order sets a precedent in that if employee home addresses are accessible to such an organization, they might be accessible to anyone, under any conditions. This case is not on appeal.

law enforcement officer or peace officer could not do his or her job." CSSEC describes these functions as "tasks which a law enforcement officer would have to perform in the absence of such persons." CSSEC argues that none of the 13 job classes about which it presented evidence meet this test.

CAUSE asserts first that CSSEC has waived its right to challenge the election on the basis of not receiving home addresses because it did not timely raise the issue. CAUSE argues that the address list was prepared in response to a directed election order and was thus an appealable administrative determination. Since CSSEC did not file an appeal of the omission of names within the 10-day period required in PERB regulations, CAUSE continues, the contention was lost.

This argument is simply incorrect. Other than to file an unfair practice charge, which it did, CSSEC had no means of challenging the home address list at the time it was issued. Neither a directed election order nor a home address list are administrative determinations that may be challenged under PERB regulations.[48] Election mechanics, which certainly includes the preparation of a home address list, are specifically not appealable to the Board.[49] The only avenue open to CSSEC to challenge the voter list was the one it chose, an unfair practice charge followed by objections to the conduct of the election.

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[48]Administrative determinations may be appealed to the Board. (See California Code of Regulations, title 8, sections 32350 through 32380.)

[49]California Code of Regulations, title 8, section 32380.

CAUSE next argues that the release of home addresses of Unit 7 employees is prohibited by, law. Citing Section 6254.3, CAUSE contends that Unit 7 employees perform "law enforcement-related functions." CAUSE argues that this clause includes more than peace officers and rejects CSSEC's interpretation as far too narrow. CAUSE would include all employees whose job duties might, subject them "to retaliation or harassment by members of the public with whom they come in contact due to their job function." Citing the PERB decision creating State bargaining units,[50] CAUSE argues that from the beginning Unit 7 members have been grouped together as performing regulatory, law enforcement and public safety and protection services.

Despite the scant legislative history of Section 6254.3, the words "law enforcement" are not without judicial interpretation in an employment context. There are several cases which construe a similar phrase, "active law enforcement service,"[51] in the context of safety retirement. For example, Government Code section 3.1469.,3 for purposes of determining pension benefits defines "safety member" as those employees "whose principal duties consist of active law enforcement or active fire suppression. . . ."

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[50] State of California (1979) PERB Decision No. 110-S.

[51] "The phrase 'active law enforcement service' appears in various sections of the Public Employees' Retirement Act (e.g., secs. 20017.5, 20021.5) as well as in the County Retirement Law of 1937 (e.g., secs. 31469.3, 31470.3, 31470.6, 31558) and the Labor Code (e.g., secs. 4850, 3212)." John E. Crumpler et al. v. Board of Administration, Public Employees' Retirement System et al. (1973) 32 Cal.App.3d 567 at 577 [108 Cal.Rptr. 293].

This provision was interpreted in Crumpler et al. v. Board of Administration, supra, 32 Cal.App.3d 567. Quoting an opinion of the Attorney General, the Court found within the term "active law enforcement" those

> . . . positions, the principal duties of which pertain to the active investigation and suppression of crime; the arrest and detention of criminals and the administrative control of such activities. . . .[52]

Thus, employees engaged in "law enforcement" are those whose job it is to investigate crimes and pursue and arrest criminals. The judicial construction of the phrase is the same as its common meaning in everyday speech. "Law enforcement" does not mean anyone who enforces any law or administrative regulation. It means anyone who enforces the criminal laws. This is a definition far less expansive than the State and CAUSE would suggest and similar to that offered by CSSEC.

It follows that a person who performs "law enforcement-related functions" is a person who either engages in law enforcement or directly assists those engaged in law enforcement. By using the words "law enforcement," the Legislature was clearly focusing on the investigation of crimes and the pursuit of criminals. The words "law enforcement" are not broad enough to include the enforcement of regulatory statutes dealing with the licensing and regulation of various commercial activities.

But the phrase includes more than peace officers. Had the Legislature intended to include only peace officers it would not

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[52]32 Cal.App.3d at p. 577.

have added the word "related" as a modifier to "law enforcement." "Law enforcement-related functions", is a phrase broad enough to include those who as part of their regular job duties assist peace officers in the investigation of crimes and pursuit of criminals. It includes, as CSSEC suggests, "persons without whose participation the law enforcement officer or peace officer could not do his or her job."

CSSEC, when applying this test, does not find that any of the job classes about which it presented evidence perform "law enforcement-related functions." I do not agree. Nor do I agree with CSSECs conclusion that in order to perform "law enforcement-related functions" an employee must "exercise discretion and independent judgment." I conclude that any employee whose principal duty is to assist in the enforcement of the criminal laws is an employee who performs "law enforcement-related functions."

The parties stipulated that all peace officers in Unit 7 are covered by the address exclusion for employees performing law enforcement-related functions. The State, thus, properly withheld their home addresses. The State also properly withheld the home addresses of the Highway Patrol and State Police communications operators and the criminal identification specialists. These employees regularly assist peace officers in their daily duties and do, therefore, perform law enforcement related functions.

However, the State was not entitled to withhold the home addresses of all employees in the positions of motor carrier specialist, deputy registrar of contractors, DMV licensing inspector, DMV licensing and registration examiner, program representative for the Bureau of Automotive Repair, brand inspector, conservationist, dairy food specialist, fire fighter and seasonal lifeguard. The only home addresses properly withheld for employees in these classes were those of individuals who, in writing, had invoked the privacy provision of section 6254.3(b).

But a finding that the State improperly withheld the home address of certain Unit 7 voters is not a finding that the election was therefore invalid. CSSEC takes it as a virtual given that if it was denied home addresses to which it was entitled that the election must be set aside. CSSEC argues that since there were only 423 votes separating the two competing unions, that "a shift of half of that number could effect the outcome." *The* union argues that if it had been given the home addresses, "it could have had a more effective campaign which might have resulted in a different outcome." Thus, CSSEC contends, the failure to provide it with home addresses was a "serious irregularity" that interfered with the right of employees to freely choose.

As noted above, however, PERB cases require more than the mere possibility that election misconduct might have changed the result. PERB cases require a showing that, taken collectively

the various unlawful activities, establish a "probable impact on the employees vote." If there were, evidence that CSSEC had no addresses of any kind for a substantial number of unit members, then one might infer a probable impact. But, as CAUSE points out, CSSEC had home addresses for a substantial number of Unit 7 members. Where CSSEC did not have home addresses, the State supplied work addresses.

Although some of the State-supplied work addresses were faulty, the evidence is insufficient to allow the inference that the State thereby prevented CSSEC from getting its message out to voters. Numerous witnesses, as CAUSE observes, testified to the receipt of CSSEC mailings either at home or at work or both. On this evidence, there is no showing of a probable impact on the election.

Voter List

The directed election order issued on February 14, 1991, by the Sacramento Regional Director sets out the following requirements for voter eligibility:

> Unless otherwise indicated below, the eligible voters shall be those employees within the unit described below who were employed on the eligibility cutoff date indicated below, and who are still employed on the date they cast their ballots in the election, i.e., the date the voted ballot is received by PERB. Employees who are ill, on vacation, on leave of absence or sabbatical, temporarily laid off, and employees who are in the military service of the United Sates shall be eligible to vote. . . .[53]

[53]The language in the directed election order substantially duplicates the voter eligibility requirements set out in PERB

The cutoff date for voter eligibility was fixed at January 31,

The bargaining unit set, out in the order was "[a]ll civil service employees whose positions are included in Unit 7" except for management, supervisory and confidential employees. There also were restrictions for employees who held multiple job positions falling into more than one state bargaining unit.

Relying on federal precedent, CSSEC argues that seasonal lifeguards have a reasonable expectation of reemployment and were therefore eligible voters. Their omission from the voter list, CSSEC continues, resulted in the denial of their right to vote and constituted a serious irregularity in the election.

CAUSE attacks this contention with a series of waiver and estoppel arguments. In the first of these, CAUSE argues that by a letter of December 21, 1990,[54] CSSEC "stipulated that seasonal lifeguards are not eligible to vote." CAUSE finds the critical stipulation in the following statement from the CSSEC letter:

> [Although] it is irrelevant whether or not these employees have voting rights within the unit, the Petitioner would agree that seasonal employees not on the state payroll at the time a petition is filed should not be counted for proof of support purposes.

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regulations. (See California Code of Regulations, title 8, section 32728.)

[54]The letter in question was a reply by counsel for CSSEC to a document filed by CAUSE on December 6, 1990. In its December 6 filing, CAUSE asserted a belief that CSSEC had used signature cards from ineligible seasonal employees to meet its proof of support. CAUSE asserted that seasonal employees who had been separated from State service were ineligible to sign authorization cards. CAUSE urged that any signatures from such employees be disregarded.

CAUSE argues it is "patently ridiculous" to suggest that seasonal lifeguards can be ineligible to sign a decertification petition and yet eligible to vote in the subsequent election. If seasonal lifeguards do not have sufficient employment interest to sign authorization cards, CAUSE argues, they do not have sufficient interest to vote.

In making this argument, CAUSE reads far too much into the concession made by CSSEC in its December 21, 1990, letter. Neither in form nor in substance was the letter a "stipulation." The very wording of the CSSEC letter yields nothing about voting rights, stating that the issue of voting rights was irrelevant to the challenge raised by CAUSE. As CSSEC notes in its reply brief, the letter simply made a very narrow concession about the calculation of the showing of support. The purpose of this was to get "the parties past a possible procedural hurdle since CSSEC was confident that even without the signatures of seasonals it would still meet the 30 percent requirement."[55]

Moreover, the CAUSE argument treats the determination of the sufficiency of a showing of support as if it were identical to the determination of voter eligibility. It is not. In a card check, the employer's list of employees is essentially unassailable. If an employee's name is not on the list, the employee's signature card will not be counted. By contrast,

[55]If CSSEC knew that it had more than sufficient signatures to meet its required showing, then it would not be harmed by excluding the cards of seasonal lifeguards from the card check. Nothing about this concession is an agreement by CSSEC that seasonal lifeguards were ineligible to vote.

employees whose names are not on the employer-prepared voter list may vote a challenged ballot which, will later be counted if the employee is found to be eligible.

The omission of the names of seasonal lifeguards from the employer's list used for determining a showing of support, or even CSSEC's decision not to rely on their names at all, has no bearing on their eligibility as voters. Accordingly, I do not find that by the letter of December 21, 1990, CSSEC has stipulated to the ineligibility of seasonal lifeguards.

CAUSE next asserts that CSSEC has waived its right to assert the eligibility of seasonal lifeguards by its failure to timely challenge their omission from the voter list. CAUSE argues that the voter list was prepared under the directed election order and when CSSEC saw that seasonal lifeguards were omitted from the list it was obligated to raise the issue at that time. Since CSSEC did not raise the issue then, CAUSE continues, CSSEC waived its right to challenge the election on this basis later.

This argument is incorrect. CSSEC had no means of challenging the voter list at the time it was issued. Neither a directed election order nor a voter list are administrative determinations that may be challenged under PERB regulations.[56] Election mechanics, which certainly includes the preparation of a voter list, are specifically not appealable to the Board.[57] The

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[56]Administrative determinations may be appealed to the Board. (See California Code of Regulations, title 8, sections 32350 through 32380.)

^California Code of Regulations, title 8, section 32380.

only avenue open for CSSEC to challenge the voter list was the one it chose objections to the conduct of the election.[58] This is, of course, the logical result. Plainly, if a party could challenge the content of a voter list prior to balloting and thereby hold up an election, the entire representation process would be susceptible to dilatory litigation.

CAUSE next asserts the equitable defenses of laches and estoppel, contending that CSSEC is guilty of unreasonable delay in challenging the voter list and that CSSEC went through the election without voicing its objections. These contentions are meritless. As noted above, CSSEC was unable to challenge the voter list until it could file objections after the election was completed. Moreover, there is convincing evidence that through Mr. Hallahan, CSSEC plainly objected during the pre-election conference to the omission from the voter list of seasonal lifeguards. There is also convincing evidence that through Mr. McCall, CAUSE objected to the inclusion of seasonal lifeguards on the voter list. There is no equitable justification for barring CSSEC from now complaining about the omission of seasonal lifeguards from the voter list.

Consideration of the question on the merits must begin with the recent decision, State of California (Department of Personnel Administration) (1990) PERB Decision No. 787-S. There, the Board

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[58]The citation by CAUSE to Oakland Unified School District et al. (1988) PERB Order No. Ad-172 is not helpful. As noted by CSSEC, the Board agent in Oakland made a formal "Administrative Determination" which was then appealed to the Board. No such determination was made here.

held that seasonal lifeguards were members of the civil service and, thus, covered under the Dills Act definition of "State employee."[59] It cannot be disputed, therefore, that seasonal lifeguards are members of State employee bargaining Unit 7.

Not all members of a bargaining unit, however, are eligible to vote in a representation election. The PERB has long limited the right to vote among part-time and temporary workers to those employees "with an established interest in employment relations" with the employer. In the context of substitute school teachers, the Board will find an "established interest" among those who have taught at least 10 percent of the pupil school days in the current or previous year. (Palo Alto Unified School District et al. (1979) PERB Decision No. 84.)

The purpose of the 10-percent rule is "to prevent substitutes without an established interest in employment relations . . . from being able to overwhelm the votes of full-time employees and the substitutes who . . . ha[ve] a greater stake, in the outcome of collective bargaining . . . ." (Oakland Unified School District, supra, PERB Order No. Ad-172.) Not only must a substitute have worked 10-percent of the current

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[59]Under section 3513(c), "State employee" is defined as:

> . . . any civil service employee of the state, and the teaching staff of schools under the jurisdiction of the Department of Education or the Superintendent of Public Instruction, except managerial employees, confidential employees, supervisory employees . . . .

or preceding school year in order to vote, he or she also must "have" a reasonable expectation of continued employment." Id.

The Board has adopted a different approach in determining the unit placement and voter eligibility of part-time community college instructors. Rather than tie eligibility to some minimal percentage of full-time hours, the Board instead has looked to the length of a community college instructor's continued service. "[P]ersons who continually, semester after semester, teach in the community college have demonstrated their commitment to and interest in its objectives." (Los Rios Community College District (1977) EERB Decision No. 18.) Thus, in community college elections the measurement of voter eligibility is whether an instructor has taught the equivalent of three or more semesters during the last six semesters inclusive.

In many respects, the Board's formulations for voter eligibility in school districts parallel the NLRB approach for voter eligibility among seasonal, intermittent and part-time workers. Under federal precedent, seasonal employees are eligible to vote in representation elections if "they have a reasonable expectation of reemployment and a substantial interest in working conditions at the employer's place of business."[60] Workers who do not meet these criteria are not eligible to vote in an NLRB-conducted representation election.

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[60]Morris, The Developing Labor Law, BNA, 1983, Vol. 1, p. 387, and cases cited therein.

In assessing whether a seasonal employee has "a reasonable expectation of reemployment," the NLRB does not find it determinative that a particular employee's name may have been dropped from the payroll.[61] Rather, the NLRB considers

> . . . factors such as the size of the labor force from which the seasonal employees are recruited, the stability of the employer's labor requirements and the extent to which the employer is dependent upon seasonal labor, the actual season to season re-employment, and the employer's preference or recall policy regarding re-employment of seasonal employees.[62]

When these factors suggest a reasonable expectation of continued employment, then the seasonal employee is an eligible voter.

As CSSEC argues, the seasonal lifeguards fall well within the NLRB guidelines for measuring a "reasonable expectation of reemployment." The labor force from which the seasonal lifeguards are recruited is not large. To be eligible, a candidate must meet a strenuous physical test which by its nature restricts the group from which the State can draw employees. The State's need for seasonal lifeguards is reasonably consistent, varying only according to the weather which affects the size of the crowds on the beaches.

Clearly, the State plans, year after year to hire seasonal lifeguards to work during the summer and other peak usage periods. Indeed, as now structured, the State could not provide

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[61]See Knapp-Sherrill Co. (1972) 196 NLRB 1072 [80 LRRM 1467], a case cited by CSSEC.

[62]L&B Cooling, Inc. (1983) 267 NLRB 1 [113 LRRM 1119 at 1120], a case cited by CSSEC.

lifeguard services in peak periods without the seasonal employees. Finally the State, prefers to rehire persons who previously have worked as seasonal lifeguards over new hires. Rehiring former employees saves time and training costs.

CAUSE makes much of the requirement that seasonal lifeguards must past a requalification test in order to be rehired each season. There can be no reasonable expectation of reemployment, CAUSE argues, because no individual can be certain that he or she will be able to pass the test. But the evidence shows that very few, if any, candidates for reemployment are denied jobs because of failure on the swim test. Given this experience, seasonal lifeguards who have worked for the State in one season can reasonably expect that they will pass the test and be rehired.

If the PERB had never dealt with the question of voter eligibility for intermittent employees; it would be appropriate to decide this case solely on the basis of NLRB practice. However, the Board has passed on similar voter eligibility questions in the public school context. Although CSSEC eschews any attempt to decide voter eligibility on the basis of a minimum number of qualifying hours, this is precisely how the PERB has approached the issue in previous cases. CSSEC has offered no reason why the voter eligibility rules set out by the Board in the public school and community college cases are inapplicable here. The policy interests the Board sought to protect in those cases are applicable in State employment. In both contexts, voter eligibility rules should aim at the widest possible

election participation consistent with a requirement that voters have a substantial stake in the outcome of bargaining.

To be eligible voters, therefore, seasonal lifeguards must possess more than a transitory relationship with the State. They must have a continuing and substantial employment relationship. Such a relationship must be shown by an employment history lasting more than one season at a level sufficient to justify an interest in the outcome of collective bargaining. This means they must work enough hours that what happens at the bargaining table has an actual impact on them. In the substitute teacher cases, the Board has fixed this level at 10 percent of a full-time position. I will apply the same standard, here.

Thus, seasonal lifeguards are eligible voters if they:

1) Have worked for the State in two or more consecutive seasons, the most recent of which was the season closest to the voter eligibility cutoff date;

2) Have worked a minimum of 10 percent of the work year of a full-time lifeguard[63] in the 12 months immediately preceding the voter eligibility cutoff date; and

3) Have a reasonable expectation of continued employment in the next season after the voter eligibility cutoff date.

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[63]The work year for a permanent, full-time lifeguard is 2080 hours. (Fifty-two weeks times 40 hours.) See testimony of Kirk Sturm, Reporter's Transcript, Vol. 4, p. 148. Thus, seasonal lifeguards must have worked a minimum of 208 hours in the 12 months prior to the voter eligibility cut off date.

Seasonal lifeguards will have a reasonable expectation of continued employment if they intend to return to work in the next season after the voter eligibility cutoff date and remain capable of performing lifeguard duties. Normally, seasonal lifeguards who meet the two-season and 10 percent requirements will be considered eligible voters. An individual seasonal lifeguard's eligibility to vote will be subject to challenge, however, by any party that can demonstrate that the lifeguard does not have a reasonable expectation of continued employment.

Application of this test to the 1991 election in Unit 7 produces the following result. There were 330 seasonal lifeguards who, by the voter eligibility cutoff date of January 31, 1991, met the two-season and 208-hour requirements.[64] Of these, 38 were listed as eligible voters on the voter list.[65] Thus, there were 292 seasonal lifeguards who were eligible voters but whose names were not contained on the voter eligibility list.

For purposes of determining impact on the election, it must be assumed that all of the eligible 292 seasonal lifeguards would have voted if afforded the opportunity. When 292 is added to the number of valid votes plus challenged ballots, the number of votes CAUSE needs to win is increased to 2182. Since CAUSE received 2122 votes, it is clear that the omission of eligible

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[64]This calculation was made by an analysis of Hearing Officer Exhibit no. 2.

[65]This calculation was made by an analysis of Joint Exhibit no. 1.

seasonal lifeguards from the ballot had an effect on the election result. The election result must therefore, be set aside.

Insofar as the directed election order conflicts with this determination, the directed election order was wrong and constituted a "serious irregularity in the conduct of the election."

PROPOSED ORDER

Based upon the foregoing findings of fact and conclusions of law and the entire record in this matter, the election objection filed by the California State Safety Employees Council/California State Peace Officers Association on the failure of the voter list to contain the names of eligible seasonal lifeguards is sustained. The omission of these eligible voters from the voter list was sufficient to affect the election result and warrants setting aside the election in case no. S-D-131-S. Accordingly, the Sacramento Regional Director is ORDERED not to certify the results of the election tallied on May 2, 1991, and to conduct a new election.

All other election objections and unfair practice case S-CO-123-S, California State Safety Employees Council/California State Peace Officers Association v. California Union of Safety Employees, and companion PERB complaint are hereby DISMISSED.

Pursuant to California Code of Regulations, title 8, section 32305, this Proposed Decision and Order shall become final unless a party files a statement of exceptions with the Board itself at the headquarters office in Sacramento within 20

days of service of this Decision. In accordance with PERB Regulations, the statement of exceptions should identify by page citation or exhibit number the portions of the record, if any, relied upon for such exceptions. (See Cal. Code of Regs., tit. 8, sec. 32300.) A document is considered "filed" when actually received before the close of business (5:00 p.m.) on the last day set for filing ".•. .or when sent by telegraph or certified or Express United States mail, postmarked not later than the last day set for filing . . ." (See Cal. Code of Regs., tit. 8, sec. 32135; Code Civ. Proc. sec. 1013 shall apply.) Any statement of exceptions and supporting brief must be served concurrently with its filing upon each party to this proceeding.. Proof of service shall accompany each copy served on a party or filed with the Board itself. (See Cal. Code of Regs., tit. 8, secs. 32300, 32305 and 32140.)

Dated: February 14, 1992

Ronald E. Blubaugh
Administrative Law Judge